***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING

75-2128

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BARRY WARREN KIBBE, :

Respondent, :

-against- : 75-2128

ROBERT J. HENDERSON, Superintendent, :
Auburn Correctional Facility,

Petitioner. :

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PETITION FOR REHEARING
OR REHEARING IN BANC

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## Preliminary Statement

This is a petition of, by, and for Robert J. Henderson, Superintendent of Auburn Correctional Facility, Auburn, New York for a rehearing or rehearing in banc from a judgment of this Court, dated April 8, 1976, which granted the petitioner's application for a writ of habeas corpus with respect to his murder conviction.* Kibbe v. Henderson, ___F. 2d ___, Slip Opin. 3081 (Lumbard and Smith, CJJ., Mansfield, CJ., dissenting). Respondent petitions to this Court because the decision is in conflict with decisions of the Supreme Court and this Court requiring that a challenged jury instruction be evaluated in light of the whole charge and the entire proceedings and is further in conflict with the principle that the Due Process Clause is inapplicable unless the challenged state error so infects the trial as to render it fundamentally unfair.

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* To conform with usual nomenclature we will continue to refer to the prisoner as the petitioner and to the Superintendent as the respondent.

## Statement of the Case

Petitioner is presently confined pursuant to a judgment of conviction for the crimes of murder in the second degree, robbery in the second degree, and grand larceny in the third degree, rendered by the Monroe County Court (Odgen, J.) after a trial by jury. Petitioner was sentenced to 15 years to life on the murder count, 5-15 years on the robbery count, and up to 4 years on the grand larceny count. His conviction was affirmed, with opinion, by the Appellate Division (41 A D 2d 218 [4th Dept. 1973]) and the Court of Appeals. 35 N Y 2d 407 (1974).

### A. The Crime

On December 30, 1970, the victim of this crime, one George Stafford, was drinking heavily in a Rochester bar with petitioner and his codefendent, Roy Krall. Stafford inquired if anyone would give him a ride and petitioner and Krall, who had already decided to steal his money, agreed. After another few drinks in another bar, they entered petitioner's car at approximately 9:30 P.M.

While Krall drove, petitioner slapped Stafford several times and took his money. Petitioner made Stafford lower his trousers and take off his boots to prove that he had no more money. Stafford was then abandoned on the shoulder of a rural, two lane road, snow-banked on both sides. Stafford, still partially undressed, was left with his jacket and boots next to him; his eyeglasses remained in the car. The temperature was near zero and gusting winds at times obscured visibility, although it was not snowing. The road was not lighted and there were no nearby houses. The nearest structure was an open

gasoline station approximately one quarter of a mile away on the other side of the highway.

William Blake, operating a pickup truck, was driving at 50 miles per hour, 10 miles over the speed limit, when two approaching cars flashed their headlights at him. Immediately thereafter he saw Stafford sitting in the middle of the road. Blake went into shock and did not have time to react; he hit Stafford. He stopped to aid Stafford, who was not wearing his jacket or boots. Stafford died shortly thereafter of massive head injuries. Tests revealed a high degree of intoxication.

B. The Trial and Charge

Petitioner and his codefendant were indicted, inter alia, for murder in the second degree, N. Y. Penal Law § 125.25(2), which provides that a person is guilty of murder when:

> "2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

At the beginning of the charge to the jury, the Court reread the indictment. The count charging second degree murder tracked the language of § 125.25(2) of the Penal Law (1162).* The Court also stated that the jury could follow the arguments of counsel in reaching its verdict, as long as they were based on evidence received (1173). The Court defined the terms "recklessly," "depraved," "grave," and "indifferent" (1187-1189) but did not specifically define "cause." The jury was instructed that to convict the defendants of a crime, "all" elements of the crime must be proved beyond a reasonable doubt (1189).



* All numbers in parantheses refer to the state trial transcript.

Immediately after this instruction, the judge reiterated the elements of second degree murder (1190). When the Court charged on the alternative count of manslaughter, he noted "quite a difference" between manslaughter and murder as charged (1190-1191). In briefly summarizing the evidence, the judge pointed to evidence regarding the "death or running into of George Stafford in the East River Road by an automobile - truck or light truck" (1197).

Additionally, upon its own request, the jury was given a copy of the indictment so it would have all the language of the various counts before it (1209; see 1204-1206). As previously stated, the indictment followed the language of the statute. The judge stated:

> "This copy of the indictment is given to you only so you can see what words are used and the different counts and consider whether the evidence as you find it has met the burden of proof of which I advised you." (1209)

When the jury returned a few hours later and requested an explanation of all four counts, the Court repeated the exact language of § 125.25(2) and said:

> "All of these factors must coincide to render a person guilty of murder under that section." (1916) (emphasis added).

Moreover, as the majority opinion in this appeal stated:

> "It is clear from the 1300 pages of pre-trial and trial transcript that the defense strategy was to demonstrate that the immediate and culpable cause of Stafford's death was Blake's operation of his truck and not the defendants' conduct." (Slip Opin. at 3087)

In addition to vigorous cross-examination of Blake and the Medical Examiner, counsel made a pretrial motion to dismiss and a motion to dismiss at the close of the prosecution's case, renewed at the close of the case.

In his opening statement, the prosecutor argued that defendants' acts, while not the sole cause of death, were nonetheless responsible for and a cause of death. (607-608). The jury had been instructed that the opening statement was to be considered a preview of what each side intends to prove.

Furthermore, in his summation petitioner's counsel repeated and accented the elements of second degree murder (1094). His codefendant's counsel argued that if there were any depraved indifference to human life it was on the part of Blake, who "caused" Stafford's death (1117-1118). Counsel described Blake's conduct and said "There you have the cause of death." (1118). See also 1125.

Finally, the prosecutor argued that defendants' reckless conduct caused Stafford's death (1132-1133, 1134, 1155) and that defendants could anticipate death by a vehicle (1152-1155). He further argued that these acts caused Stafford's death even though there "were not the only, the direct or most preceding cause of his death" and gave an example of an intervening cause which would not negate the original actor's responsibility for ensuing death (1155-1157).

The Court had instructed the jury that the arguments of counsel were "advanced for your help in reaching a fair and just verdict" and could be followed by the jury as long as they were based on evidence received (1173).

Petitioner was apparently satisfied that the issue of causation was sufficiently and properly before the jury since he made no objection to the charge and made no request for a separate instruction on causation. Nor did his brief to the Appellate Division raise a challenge to the charge; it merely attacked the sufficiency of

evidence to sustain the conviction.

C. Prior State Proceedings.

Although petitioner did not challenge the charge in his brief to the Appellate Division, the Court considered the charge in the interests of justice, Crim. Proc. Law § 470.15(3)(c), (6)(a), apparently because of the dissenting opinion. While the Court found the charge "lacking in detail," it held that:

> "the charges together with language of the statutes and indictment and the evidence were sufficient to inform the jury on the subject." 41 A D 2d at 230.

The Court of Appeals refused to disturb the Appellate Division's discretion in refusing to reverse under the "interests of justice" section. 35 N Y 2d at 414.

D. Prior Federal Proceedings.

Petitioner's application for habeas corpus was denied by the United States District Court for the Northern District (Foley, J.) on June 27, 1975. The Court held that the challenge to the jury charge failed to raise a claim of constitutional dimension.

The majority of the panel hearing the appeal reversed, granting a writ as to the murder conviction.* The Court noted that petitioner was entitled to have each element of the crime found beyond a reasonable doubt. The Court specifically declined to evaluate the challenged jury instruction in light of evidence presented and the arguments of counsel. Instead, the Court held that the failure to specifically instruct on the issue of causation caused petitioner to be deprived of his right to have that element of the crime found beyond a reasonable doubt. The Court speculated that the jury might have

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* Petitioner's additional claim that unlawful evidence was admitted at trial was rejected. Slip Opin. at 3083 n. 1.

concluded that that issue was not before them or that they could infer causation from the fact that Stafford's death followed his abandonment by petitioner and Krall. The Court further stated that the legal standard in the area of causation was complex and that the jury was inadequately equipped by the charge to make a decision.

Judge Mansfield dissented, holding that the failure to give a more detailed instruction did not raise an issue of fundamental unfairness. Against the background of the evidence and summations, the dissent found that the jury was aware of the necessity of finding that petitioner's conduct caused the death, although it may not have been the only cause. The judge stated: "In these circumstances the court's instruction was sufficient to enable the jury to intelligently go about its business." Slip Opin. at 3096.

## ARGUMENT

THE DECISION IS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT AND THIS COURT REQUIRING THAT A CHALLENGED ERROR IN THE JURY INSTRUCTION BE EVALUATED IN LIGHT OF THE WHOLE CHARGE AND THE ENTIRE PROCEEDINGS AND IS IN CONFLICT WITH THE PRINCIPLE THAT THE DUE PROCESS CLAUSE IS INAPPLICABLE UNLESS THE CHALLENGED STATE ERROR SO INFECTED THE TRIAL AS TO RENDER IT FUNDAMENTALLY UNFAIR.

### A. The requirement that a challenged instruction be evaluated in light of the whole charge and the entire proceedings.

Recently, in Cupp v. Naughten, 414 U.S. 141, 147 (1973), the Supreme Court set forth the test for evaluating a challenge to a charge

to a jury:

> "In determing the effect of this instruction on the validity of respondent's [state] conviction, we accept at the outset the well-established proposition that a single instruction may not be viewed in artificial isolation but must be viewed in the context of the overall charge. Boyd v. United States, 271 U.S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see Cool v. United States, 409 U.S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus, not only is the challenged instruction but one of many such instructions, but the process of instruction is but one of many components of the trial which may result in the judgment of conviction." 414 U.S. at 147.

Accord, United States v. Park, ___ U.S. ___, 44 L. Ed. 2d 481, 502-503 (1975); Byrd v. Hopper, 402 F. Supp. 787, 788-789 (N.D. Ga. 1975).*

Indeed, this Court has enunciated this same rule with regard to its own appeals. E.g. United States v. Evans, 484 F. 2d 1178, 1187-1188 (2d Cir. 1973); United States v. Adreadis, 366 F. 2d 423, 434 (2d Cir. 1966). Certainly the state courts cannot be bound by any stricter test in collateral federal review.

Accordingly, petitioner's claim that his constitutional rights were violated by the failure of the trial court to specifically define "cause" must be evaluated in light of the entire charge as well as counsel's arguments and the evidence at trial. The majority decision in the instant appeal not only failed to make such an evaluation but also specifically refused to do so. The majority stated that the evidence before the jury and the summations, which both raised the causation issue, were not relevant to the analysis. Slip Opin. at 3090

* That a jury will consider the proceedings before it, despite instructions by the trial court, was the basis for the holding in Bruton v. United States, 391 U.S. 123 (1968).

and n. 5, 3092.

The Cupp case, as well as this Court's own decision, require that the claimed error be evaluated in light of the whole charge and entire proceedings. Respondent submits that when petitioner's claim is evaluated in such a context, it is clear that he was not denied a fundamentally fair trial, the yardstick for measuring due process claims against state trial errors, especially in federal habeas corpus review. See post at 11-14 ; dissenting opinion, Slip Opin. at 3094-3097.

While the majority accurately noted that the trial court specifically defined various terms of Peanl Law § 125.25(2), such as "depraved", "recklessly," "grave," and "indifferent," but not "cause," this is not the end, but only the beginning of the inquiry. The jury was read the indictment, which followed the language of the statute. The Court instructed that all elements of the crime must be proved beyond a reasonable doubt and immediately thereafter again read the elements of the crime. In summarizing the evidence, the judge referred to evidence as to the death of Stafford by a vehicle.

At its request, the jury was given a copy of the indictment and told that it was to be used "so you can see what words are used and the different counts and consider whether the evidence as you find it has met the burden of proof of which I advised you." Finally, when the judge repeated all four counts at the jury's request, he repeated the language of § 125.25(2) and instructed "All of these factors must coincide to render a person guilty of murder under that section." (emphasis added). Accordingly, to speculate that omission of a precise definition of the word "cause" either permitted the jury to conclude that the issue was not before them or to assume that

causation could be inferred from the fact that Stafford's death followed his abandonment is just that -- speculation which ignores the rest of the charge.*

Moreover, when the charge is considered in the context of the entire trial proceeding, this speculation is rendered even more inaccurate and unfair. The prosecutor's opening to the jury specifically argued that petitioner's acts, while not the sole cause of death, were nonetheless responsible for and were one cause of Stafford's death. As the majority noted, the defense strategy throughout the trial was to demonstrate that the cause of death was the motorist's operation of his truck, not petitioner's acts. Slip Opin. at 3087. To this end, the motorist and Medical Examiner were vigorously cross-examined.

Finally, the trial court specifically instructed the jury that counsel's arguments were presented to assist them in reaching a fair verdict and could be followed by the jury as long as they were based on evidence received. Petitioner's counsel, in his summation, repeated and accented the elements of second degree murder. His codefendant's counsel argued that if there were depraved indifference to human life, it was on the part of the motorist who "caused" Stafford's death. The prosecutor argued that reckless conduct of the defendants, while not the direct or most preceding cause of death, was nonetheless one cause of death and that the results of such conduct were foreseeable.

In light of the evidence, arguments of counsel, and entire charge presented to the jury in petitioner's trial, it cannot be said that the failure to specifically define the word "cause" fatally infected the trial so as to render it fundamentally unfair. As the

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* Compare cases in which the trial court did withdraw a factual issue by improperly informing the jury that the fact was undisputed. E.g. United States v. Singleton, ___ F. 2d ____, Slip Opin. 1873, 1886-1889 (2d Cir. February 13, 1976); United States v. Hines, 256 F. 2d 561, 564 (2d Cir. 1958).

dissent found, "In these circumstances, the court's instruction was sufficient to enable the jury to intelligently go about its business." Slip Opin. at 3096.* See Lyons v. Oklahoma, 322 U.S. 596, 601 (1944) (specificity of charge in state court is a matter of state procedure as long as it fairly raises the issue). The refusal of the majority to evaluate petitioner's claim as directed by the Supreme Court and prior decisions of this Court is an error which should be reconsidered by the panel or by a full bench of this Court.

B. The requirement that the challenged error so infect the trial as to render it fundamentally unfair.

Ordinarily, a jury charge in a state trial is not reviewable in a federal court. Buchalter v. New York, 319 U.S. 427, 431 (1943); United States ex rel. Stanbridge v. Zelker, 514 F. 2d 45, 50 (2d Cir. 1975), cert. den. ___ U.S. ___; United States ex rel. Smith v. Montanye, 505 F. 2d 1355, 1359 (2d Cir. 1974), cert. den. ___ U.S. ___; Schaefer v. Leone, 443 F. 2d 182, 184 (2d Cir.), cert. den. 404 U.S. 939 (1971). In order to prevail in federal court, a petitioner must show that the instruction "so infected the entire trial that the resulting conviction violates due process" (Cupp v. Naughten, supra, 414 U.S. at 147), that is, rendered the trial fundamentally unfair. E.g. Pleas v. Wainwright, 441 F. 2d 56, 57 (5th Cir. 1971); Byrd v. Hopper, supra, 402 F. Supp. at 788; United States ex rel. Birch v. Fay, 190 F. Supp. 105, 107 (S.D.N.Y. 1961).

It is the well-established rule that as applied to a state

* The majority argues also that the issue of intervening cause is complex and the instruction was inadequate to the task. Slip Opin. at 3090-3093. In light of the totality of circumstances discussed above, the issue was adequately before the jury. Petitioner's own counsel obviously thought so, since he failed to object or request a charge and did not challenge the charge in his brief to the Appellate Division. Whether petitioner could have prevailed under the instruction suggested by the majority is not even clear. See People v. Kibbe, supra, 35 N Y 2d at 412-413; People v. Kane, 213 N.Y. 260, 270-271 (1915); Cox v. People, 80 N.Y. 500, 515 (1880).

criminal trial, denial of due process is the "failure to observe that fundamental fairness essential to the very concept of justice" and the absence of fairness must "fatally [infect] the trial." Lisenba v. California, 314 U.S. 219, 236 (1941). The requirement that a challenged jury instruction be evaluated in the context of the entire proceeding is precisely adapted to analyzing for fundamental unfairness of the trial itself.

The failure to properly analyze petitioner's claim in the context of the fundamental fairness rule is particularly egregious in federal habeas corpus review of a state criminal conviction.

> "The writ of habeas corpus has limited scope; the federal courts do not sit to to re-try cases de novo but, rather, to review for violation of federal constitutional standards." Milton v. Wainwright, 407 U.S. 371, 377, (1972).

See Schaefer v. Leone, supra, 443 F. 2d at 184.

The decision of the majority opens the doors of the federal habeas corpus courts to hundreds of state prisoners who can now claim that a defective or inadequate charge on a material element of the crime was given, and that accordingly, that element of the crime was not properly before the jury for a finding beyond a reasonable doubt. That few of these petitioners might prevail is of little moment to the courts who must decide the cases, or to the state attorneys who must read the transcripts and file a response. Indeed, in Schaefer v. Leone, supra, this Court rejected a challenge by a state petitioner who claimed that the jury instructions failed to charge on an essential element of the crime, stating (443 F. 2d at 184):

> "Were we to hold otherwise, the District Court's

> rationale would turn every disagreement by a federal district judge with a State court's interpretation of a State statute and their appraisal of a State trial judge's instructions thereunder potentially into a question of 'fundamental due process.' This result would impose an additional burden on our already overburdened federal courts and pose an unnecessary and undesirable threat of greatly increased federal intervention in cases involving the sufficiency of jury instruction and the construction of State law. Any such interpretation would be contrary to the proper historic federal habeas corpus jurisdiction, namely, not to serve as the basis for merely an additional appeal."

In fact, those cases which have reached the Supreme Court have involved specific instructions by a judge on the issue of presumption of innocence or burden of proof, issues which clearly might have unfairly infected an entire trial. In Cupp v. Naughten, supra, the petitioner challenged a charge that every witness is presumed to tell the truth although the presumption may be overcome by his manner, character, testimony, or other evidence. 414 U.S. at 412. Similarly, in Cool v. United States, 409 U.S. 100 (1972), the challenged instruction in a federal trial directed that an accomplice's testimony should be credited if it was believed true beyond a reasonable doubt, thus unconstitutionally shifting the burden of proof.* See also Trimble v. Stynchcombe, 481 F. 2d 175 (5th Cir. 1973) (instruction in state trial unconstitutionally shifted burden of proof).

In the instant case, the lack of detail by the trial court on the word "cause", conceded by the appellate courts (People v. Kibbe, 41 A D 2d at 230; 35 N Y 2d at 414), raises no more than a question

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* United States v. Park, supra, 44 L. Ed 2d 489, and Boyd v. United States, 271 U.S. 104 (1926), involved review of challenged instructions in federal trials in which the Supreme Court was acting in its supervisory authority over the lower federal courts.

of state law error. When the entire charge is considered in the context of the proceedings, as is required by Supreme Court decisions, it is manifest that the issue of causation was sufficiently before the jury for determination. In no event is this a case in which an error has fatally infected the trial, "necessarily" preventing a fair trial. Lisenba v. California, supra, 314 U.S. at 236. The failure of the majority to evaluate the challenged charge in the entire context of the trial and accordingly its failure to analyze whether there had been fundamental unfairness in the trial is a disservice to the basic principles governing the application of the Due Process Clause and the tenets underlying habeas corpus jurisdiction.

## CONCLUSION

THE PETITION FOR REHEARING OR REHEARING IN BANC SHOULD BE GRANTED.

Dated: New York, New York
April 28, 1976

Respectfully submitted,

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